

CLYDE&CO

Injury Claims From Accidents Abroad

CRAIG EVANS



What are we going to cover?

- Types of claim
- Jurisdiction for claims in overseas incidents
- Applicable Law in overseas incidents
- Why is applicable law key – A comparison between jurisdictions.
- Brexit implications in this area of law

Types of Claim

- **In the last 10 years this is a significant growth area for Claimant firms.**
- **The key areas of claim are:**
 - RTA's/PL Claims (Odenbreit)
 - Package Travel Regulation Claims
 - Employers' Liability Claims

First things first - The two questions

- 1. Jurisdiction** - Can the claim be litigated in England & Wales?
- 2. Applicable Law** – If so, which country's law will govern the issues in the case?

Jurisdiction Rules

1. **Regulation 1215/2012. ‘Brussels I /Judgement Regulations Recast’**
2. **Common Law Rules – CPR Part 6 – Practice Direction B.**
3. Lugano Convention (Switzerland, Norway, Iceland)
4. Montreal Convention for carriage by air.
5. Athens Convention – for carriage by sea.
6. Schedule 4 of the Civil Jurisdiction and Judgements Act 1982. (UK)



EUROPEAN FRAMEWORK

Brussels 1 Recast

Accident in EU Member State Jurisdiction – Brussels I recast

- Simple default position is
 - **Art 4(1) Defendant to be sued in home Court.**
 - *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*
 - **Art 7(2) Special Jurisdiction**
 - *in matters relating to tort, delict or quasi-delict, in the courts for the place **where the harmful event occurred or may occur.** Harmful event is narrow and living with the effects of the injury does not qualify.*
 - “Harm” is construed narrowly. If an English person has an accident in Spain, the harm is in Spain, not where they live out their injuries.
 - **Art 8(1) Number of Defendants**
 - A person who is domiciled in a member state who is one of a number of defendants may be sued in the courts of the place where any one is domiciled

Accident in EU Member State Jurisdiction – Brussels I recast

Brussels 1(a) art 11.

1. An insurer domiciled in a Member State may be sued:

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, **in the courts for the place where the plaintiff is domiciled.**

Brussels 1(a) art 13

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, **where such direct actions are permitted.**

Direct Rights of Action against the Motor Insurer

- Fourth Motor Directive (now consolidated in Sixth Directive).
- All Member States are required to provide victim of RTA with direct right of action against insurer of person responsible.
- European Communities (Rights Against Insurers) Regulations 2002.

FBTO Schadeverzekeringen NV v Jack Odenbreit (Case C-463/06)

The ECJ held:

“...the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State”

- *FBTO Schadeverzekeringen NV v Odenbreit (C-463/06)* held art. 13(2) (then 11(2) of the original Brussels I) permits direct action against insurer to be brought in injured person’s home court where national law permits.
- For cases arising from accidents from 11 January 2009, national law permits direct action *“if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides”* (Rome II, art. 18)
- The Claimant has to be domiciled in England or Wales at the time of issue of proceedings in order to bring proceedings in the Courts of England & Wales.

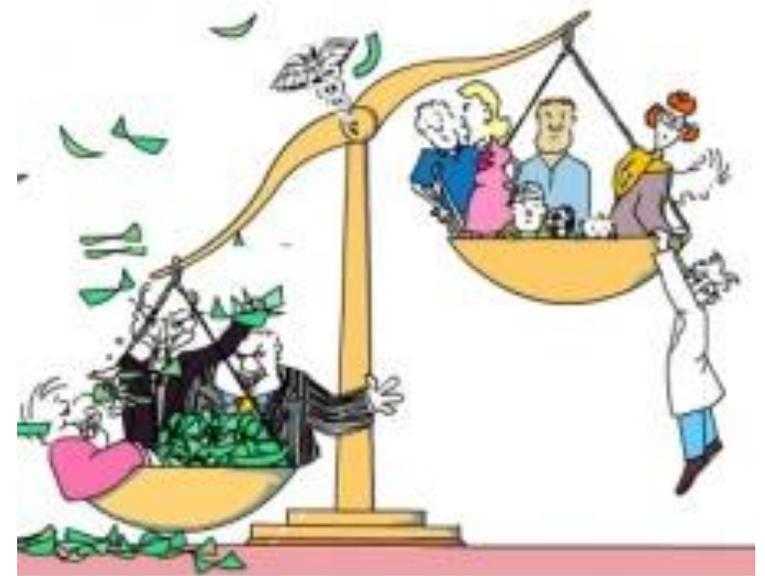
Odenbreit – practical application

- Can join the tortfeasor as well as insurer, e.g. if indemnity limit and solvent tortfeasor: ***Mapfre Mutualidad v Keefe***[2015] EWCA Civ **598** (appeal to Supreme Court and ECJ).
- Motor claims have a particular position as Fourth Motor Insurance Directive required every Member State to create direct action for victims.
- However, several European countries (e.g. France, Spain, Belgium) contain broader rights to claim directly against the liability insurer of the tortfeasor. Not limited to motor claims. *Thwaites v Aviva*
- In non-motor claims, look out for territorial limits, e.g. this policy will indemnify only against liabilities established before the courts of Spain: ***Williams v Mapfre*** (HHJ Halbert, Chester County Court, 13 April 2015).

Do we always want English & Wales system and procedure?

England has:

- High levels of damages
- Very high level of Claimant Solicitors costs
- At present, a negative discount rate
- A highly litigious population
- Courts are perceived to be Claimant friendly as they are seen as the small party v large insurers
- QOCS - Defendant wins and still pays own costs.



Can Insurers Escape Odenbreit?

- Commencing proceedings where the accident happened under Article 7(2)?
- Negative declaration.
- Potentially available in England: *Toropdar*
- In some European countries, a defendant not disputing liability can issue proceedings to have damages assessed. Frequently used in Belgium.

Tactical Applications to Escape Jurisdiction

Four types of action by defendant (assume one English and one foreign driver):

1. Insurer sues in own name.
2. Foreign driver sues in own name for benefit of insurer.
3. Foreign driver sues in own name partly for own benefit and partly for insurer's.
4. Foreign driver sues in own name for own injuries.
 - Foreign driver can sue English driver in the foreign country under art.7(2).
 - If English driver later sues foreign driver's insurer in England, English claim might be stayed under art.30 as a related action.

**Jurisdiction outside of EU
Framework**



Jurisdiction: Common law rules for claims in tort

By paragraph 3.1(9) of PD6B, jurisdiction exists at common law over a claim in tort where:

“(a) damage was sustained, or will be sustained, within the jurisdiction; or

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”

Jurisdiction: Common law rules for claims in tort

- What type of damage suffices under (a)? Line of cases suggesting consequential loss will suffice.
- CA in ***Brownlie v Four Seasons Holdings*** [2015] EWCA Civ 665 held must be direct damage, i.e. the initial injury.
- But Supreme Court in December 2017, albeit only obiter as case was lost on unrelated point, that damage includes consequential loss.

Applicable Law – Rome II

- Rome II applies to events giving rise to damage occurring after 11th January 2009: *Homawoo v GMF Assurances SA* (C-412/10).

DECISIONS
IN THE
COURT OF
SESSION

1ST SERIES

1829-30

SHAW, ETC.

Applicable Law – Rome II

- Article 4(1) **Applicable law** is “*the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*”(art.4(1)).
- Distinguish “**occurrence of damage**” from “**event giving rise to damage**” and from “**indirect consequences**”.
- Article 4(2) Where claimant and defendant “*both have their **habitual residence in the same country***”, that country’s law applies.
- *Winrow v Hemphill* [2014] EWHC 3164 (QB).

Applicable Law – Rome II

- Where the tort is “*manifestly more closely connected*” with another country, that country’s law applies (art. 4(3)).
- “*Manifestly*” is likely to mean exceptionally.
- Consider relevant facts at date of decision, i.e. consider consequences.
- *Marshall v MIB* [2015] EWHC 3421 (QB)

Expert Evidence – In Rome II Claims

- Rome II provides that it does not apply to ‘**evidence and procedure**’ (art 1.3).
- Article 15(c) Damages *The existence, the nature and the **assessment of damage** or the remedy claimed* are all to be governed by the substantive applicable law
- The Court of Appeal, in interpreting the provisions in Rome II (dealing with tort and delict cases), held in [Wall v Mutuelle De Poitiers Assurances \[2014\] EWCA Civ 138](#), that when dealing with the issue of expert evidence the law of the forum as it is *‘evidence and procedure’ applies rather than the applicable law of the dispute.*

Expert Evidence – In Rome II Claims

- An English court would be '*ill equipped*' to deal with expert evidence given in the way it would be in a Foreign court.
- Practically English Experts report on medico-legal issues.
- Foreign Experts on law and valuation.



What difference does it make? Spanish System and Procedure v English



What difference does it make?

English v Spanish Law

- RTA in Spain. 35 year old pedestrian crossing on main road late at night.
- The pedestrian was slightly intoxicated, and crossed on the pedestrian red light. Taxi was travelling on the road and travelling 10kph over the speed limit. Taxi collided with pedestrian at crossing.
- Pedestrian suffered catastrophic severe brain injury, lacks capacity, spinal injury and will need lifetime care.

What difference does it make? English v Spanish Law

	Liability	Quantum
English Law	English law protects the weaker party and recognises that the driver of a vehicle has a heightened responsibility, con neg deduction here would be 20-35% .	With -0.75% discount rate, claim valued in excess of £20 million .
Spanish Law	Spanish case law consider that the victim is <u>solely</u> liable when crosses the road with red lights. This changes when the car is over the speed limit. Under Spanish Law in this scenario, the deduction of the claimants damages is between 50-70% .	New Baremo applies which tries to follow position of restitutio in integrum, it has increased Spanish damages, however in reality there are caps. This claim is valued less than £7 million .

In this scenario it is the potential difference between a £16 million claim and a £2.1 million claim.

Brexit - 11pm on 29 March 2019



Brexit - 11pm on 29 March 2019

Transition Period

Jurisdiction

Article 67 of the Draft Withdrawal Agreement covers jurisdiction. It provides (inter alia):

- The Recast Judgments Regulation (Regulation (EU) No. 1215/2012) will apply in respect of legal proceedings “**instituted**” (presumably this means “**issued**”) before the end of the transition period.
- The Recast Judgments Regulation will apply to the **recognition and enforcement of judgments** given in legal proceedings “instituted” before the end of the transition period and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period.
- These provisions also apply to the special agreement between the EC and Denmark (by article 69(3)).

Brexit - 11pm on 29 March 2019

Transition Period

Applicable Law

Article 66 covers applicable law. It provides:

- The Rome I Regulation (Regulation (EC) No. 593/2008) will apply in respect of contracts concluded before the end of the transition period.
- The Rome II Regulation (Regulation (EC) No. 864/2007) will apply in respect of events giving rise to damage, where the events occur before the end of the transition period.

After March 2019 if there's no deal

- In the (un)likely event that there is no deal:
- There would be no agreed EU framework for ongoing civil judicial cooperation between the UK and EU countries.
- Loss of reciprocity, in the event of a no deal scenario, we would repeal most of the existing civil judicial cooperation rules.
- Revert to domestic rules which each UK legal system currently applies in relation to non-EU countries.

After March 2019 if there's no deal

Following rules would be repealed for all parts of the UK:

- **Brussels 1a** – Where would this leave Odenbreit claims?;
 - **The Enforcement Order**;
 - **The EU/Denmark Agreement**;
 - **The Lugano Convention**.
-
- All parts of the UK would retain the **Rome I and Rome II** rules on applicable law in contractual and non-contractual matters.
 - These do not rely on reciprocity.
 - These would become part of domestic law.

Brexit - 11pm on 29 March 2019

Government Advice

Handling civil legal cases that involve EU countries if there's no Brexit deal

Published 13 September 2018

*'Any party to a cross-border legal dispute, including businesses...would need to consider the effect that these changes would have on any existing or future cases involving parties in EU countries.. **Where appropriate you may wish to seek professional legal advice**'*

Final thought...



The British will continue to travel in Europe and beyond, and they will continue to have accidents, so there will certainly continue to be more work and claims in this area irrespective of the legal framework!!!!

Any questions?

Craig Evans

Craig.evans@clydeco.com

415+

Partners worldwide

2,200

Lawyers and fee
earners worldwide

50+

Offices across Europe,
Americas, Middle East,
Africa and Asia.

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